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The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration

ESTER HERLIN-KARNELL AND THEODORE KONSTADINIDES*

Abstract

The principle of consistency has a prominent place in EU law. In the Treaty of Lisbon, it constitutes an umbrella under which a number of legal principles of EU law follow as corollaries. Consistency manifests itself within both horizontal and vertical levels of governance. This chapter will unpack this principle and will focus on the broader implications of consistency for the division of powers in EU law. In doing so, the authors aim to discuss the rise of consistency in EU law and decrypt its various constitutional expressions in order to determine its scope of application. Two notions of consistency are presented: a formal one that appears in the Treaty of Lisbon and a strategic one, prominent in the case law of the Court of Justice of the European Union (CJEU). It is argued that consistency is relevant to both traditional (integrationist) and alternative (differentiated) routes to European integration. The chapter concludes by discussing whether the undefined nature of ‘consistency’ puts it at risk of becoming an empty vessel.

I. INTRODUCTION

THIS CHAPTER ANALYSES the rise and expressions of the principle of consistency in EU law by looking at its increasingly important role in contemporary EU law. In particular, the contribution looks at

* Special thanks go to Gareth Davies and Luke Mason as well as to the anonymous reviewer for their helpful suggestions. The usual disclaimer applies.

how the Court of Justice of the European Union (CJEU) uses the notion of 'consistency' as a legal tool for deciding on 'hard' cases. It aims to evaluate the constitutional impact of consistency in EU law by looking at how it drives uniform outcomes and attempts to ensure an institutional balance within the different speeds of EU integration. It is highlighted that the undefined scope of consistency hides the danger that it becomes an empty term which means all or nothing.

The chapter is structured into three sections. Section II discusses briefly the place of consistency in EU law. It investigates the meaning of consistency by analysing it in the light of its broader implications for the division of powers in EU law. It also looks at how the EU's emphasis on consistency is reflected in the constitutional structure of the Treaty of Lisbon. We focus on the function of consistency as a means of promoting clearer competence delimitation and conflict prevention/resolution between the EU and the Member States' legal orders. This notion is built on the premise that consistency forms a prerequisite of EU legislation and is synonymous with legal stability in the EU legal order.

Section III focuses on the meaning of consistency as an integrative tool in the EU machinery. It investigates how the Treaty of Lisbon has reinforced the use of consistency (both horizontally and vertically) from mainly an external relations principle (found in the former Article 3 TEU) to a free-standing formal legal imperative which governs the EU legal integration process. We critique, in particular, the CJEU's reading of 'strategic' consistency, which comes close to the classic effectiveness reasoning in EU law by resembling a 'catch-all' provision. We analyse such a coercive character of the notion of consistency in EU law by looking into cases where the CJEU is pushing Member States to achieve uniform results. Our analysis benefits from examples drawn from different policy areas.

Section IV identifies the place of consistency with regard to the notion of differentiated integration. We look at the meaning of the principle of consistency in the context of differentiation and flexibility. In doing so, our aim is to demonstrate that consistency does not always mandate a holistic approach to integration, but helps to generate uniform outcomes within ad hoc initiatives or, to put it differently, sub-legal systems operating at different speeds within the EU. To use an example, consistency manifests itself within the area of enhanced cooperation as a means of aligning diversity with the wider policies of the EU. However, differentiation also includes a number of modalities which do not expressly require consistency in order to operate. For instance, there is no reference to consistency in the relevant treaty provisions regulating the so-called 'opt-outs'. This is despite the dangers that such 'differentiation' carries for European integration from the perspective of uniformity. The question is therefore whether or not consistency can be utilised effectively as a means of managing differentiated integration that varies across both EU policies and Member States.

Two notions of consistency in EU law are identified in the present chapter, namely: i) formal consistency; and ii) strategic/policy oriented consistency. While the notion of formal consistency is attributed to the treaty structure and its insistence on institutional balance, the concept of ‘strategic’ consistency is linked to judicial interpretation, in particular, the CJEU’s eminent teleological, or purposeful, reasoning.¹

II. THE MEANING OF CONSISTENCY IN EU LAW

Consistency ranks high in the EU legal chart as a constitutional principle which is relevant not only in the context of adjudication but also at the legislative and constitutional levels. This is evident from the numerous references to consistency in the Treaty of Lisbon as a legal obligation assigned to EU institutions. Yet a number of language versions of the treaties refer to consistency as coherence.² In the literal sense, though, consistency does not necessarily denote coherence and vice versa. In EU law, consistency is often defined as ‘the absence of contradictions, whereas coherence refers to positive connections’.³ While recognising that EU policies shall be both consistent and coherent, this chapter will refer to ‘consistency’, used in the English-language version of the Treaty of Lisbon, as an all-encompassing principle rather than a precondition to coherence.⁴ This is for the sake of clarity, as well as in order to avoid making a false allegation out of linguistic pedantry that the treaty drafters omitted to pay lip service to the principle of coherence by referring to consistency.

The concern and desire for consistency is not a unique feature of the EU legal order—it is rather eminent in any study of law and has often appeared in debates concerning legal reasoning. In short, consistency implies that two rules are consistent when they produce the same result on the same facts or raise a similar legal issue. Moreover, the notion of consistency is concerned

¹ Teleological or purposive interpretation means in this context interpretation in accordance with the rationale of the provision or the policy aim underlying the rule. See M Hesselink, ‘A Toolbox for European Judges’ (2011) 17 *European Law Journal* 441.

² For an overview of the different language interpretations of consistency, see C Franklin, ‘The Burgeoning Principle of Consistency in EU Law’ (2011) *Yearbook of European Law* 11. For academic references to coherence, see M Cremona, ‘Coherence in European Union Foreign Relations Law’ in P Koutrakos (ed), *European Foreign Policy: Legal and Political Perspectives* (Cheltenham, Edward Elgar, 2011) 59; S Prechal and B van Roermund, *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford, Oxford University Press, 2008). See also D Leczykiewicz, ‘Why Do the European Court of Justice Judges Need Legal Concepts?’ (2008) 14 *European Law Journal* 773.

³ G De Baere, *Constitutional Principles of EU External Relations* (Oxford, Oxford University Press, 2008) 251. See also R Holdgaard, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses* (The Hague, Kluwer Law International, 2008) 415.

⁴ See, eg, M Derlén, *Multilingual Interpretation of EU law* (The Hague, Kluwer Law International, 2009) 352.

with the symmetry of all components of a given legal system. In this context, it might be useful to turn to Dworkin, who notably argued that the concept of coherence in law goes beyond 'bare consistency', ie, a mere agreement and compatibility between a set of rules.⁵ Coherence in this respect represents consistency and 'a single vision of justice'⁶ or, in other words, 'integrity'.⁷ According to Dworkin, in a non-utopian political society, we value not only justice and fairness and procedural due process, but also distinct political values which are referred to as 'integrity'.⁸ This view of consistency could be labelled as 'strategic' consistency. But it is not only Dworkin who discussed consistency in legal theory. The notion of consistency or coherence embodies MacCormick's contention that the law should make sense if considered as a whole by being rational and orderly.⁹ It is about ensuring common sense by insisting on consistency. Hence, consistency as a systemic principle is embedded in the constitutional text of a legal system as an element of the rule of law, helping to ensure legal certainty. As such, it constitutes a virtue by which a given legal system is to be judged. In EU law, however, consistency can be divided into vertical consistency based on clear competence delimitation and conflict prevention/resolution between the EU and the Member States' legal orders, and horizontal consistency based on cooperation between the institutional actors involved in EU decision making.¹⁰ Consistency therefore finds expression within a web of legal obligations in EU law. It is reflected in the notions of loyalty and primacy (vertical consistency), as well as in the broader principles of good administration and good governance related to openness, transparency and accountability to democratic institutions (horizontal consistency).¹¹ But still, this broad categorisation does not make consistency self-evident as a legal obligation.

The principle of consistency can be found in a number of EU treaty provisions, which either set a general obligation for EU institutions to act consistently (in accordance with EU objectives and values) within the bounds of their competence or draw their attention into certain areas (eg, external relations) where consistency is a necessary guideline in order to

⁵ R Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978).

⁶ S Guest, *Ronald Dworkin* (Stanford, Stanford University Press, 1991) 39–40.

⁷ Discussed in M Maduro, 'Three Claims of Constitutional Pluralism' in M Avbelj and J Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Oxford, Hart Publishing, 2012). See also S Besson, 'From European Integration to European Integrity: Should European Law Speak with Just One Voice?' (2004) *European Law Journal* 257.

⁸ For a discussion of Dworkin in the light of legal pluralism, see P Eleftheriadis, 'Pluralism and Integrity' (2010) 23(3) *Ratio Juris* 365, 377–78.

⁹ N MacCormick, *Legal Reasoning and Legal Theory* (Oxford, Clarendon Press, 1978, reprinted paperback edn 1995) xiv.

¹⁰ See, eg, M Cremona, 'Coherence through Law: What Difference Will the Treaty of Lisbon Make?' (2008) 3(1) *Hamburg Review of Social Sciences* 17.

¹¹ See, eg, European Commission, 'European Governance (White Paper)' COM(2001) 428 final.

achieve a coherent legislative result. This form of consistency has a central place in the enactment of integrative and unifying legislation by the EU legislative institutions. Yet, consistency is not always utilised as a means of furthering integration. As discussed later in this chapter, it may also apply in areas not strictly characterised by integration. A study of the treaty's provisions on flexibility and enhanced cooperation in the Area of Freedom, Security and Justice (ASFJ) and the EU's external action reveals that consistency manifests itself differently when Member States decide to proceed at different speeds of integration.

Finally, the notion of consistency finds meaning in judicial interpretation and reasoning. Lack of consistency therefore results in legal uncertainty, which in the context of CJEU case law would have an adverse effect on, for example, the rights of EU citizens.¹² Of course, EU law is not merely about setting a number of objectives inherent in the treaties but is also about judicial arguments as to what these objectives should entail. Unavoidably, the CJEU is commonly confronted with 'hard cases'. The well-known *Viking*¹³ judgment offers an illuminating account of how the CJEU sets out to tackle such hard cases. As it is eminent, in *Viking*, the CJEU was called upon to balance the right to free movement of workers against social protection advocated by labour unions. The CJEU favoured its classic market template in a horizontal situation of trade unions against the individual building companies and workers. It was a 'hard case' because, on the one hand, the CJEU had to ensure that free movement was complied with and make sure that national protectionism was avoided at all costs. On the other hand, there were sensitive labour law and social protection issues at stake.¹⁴ The CJEU chose to uphold free movement law. It can be argued that most of the early cases in European integration (where the CJEU had to establish the autonomous legal nature of the EU legal system) were all hard cases. Moreover, the notions of effectiveness and uniformity formed part of the broader constitutional understanding of the principle of consistency in EU law.

Thus, consistency has over time become an anchoring point for extending EU law competences. However, value-based consistency should be distinguished from the distinct notion of purposeful or teleological consistency employed by the CJEU. In the CJEU's case law, consistency appears closely linked to the uniform application of EU law in the Member States by broadening the scope of EU (implied) powers. This pragmatic version

¹² Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission, Council and UK v Yassin Abdullah Kadi*, Advocate General Opinion Bot, 19 March 2013, unreported. AG Bot opined that the principle of judicial review laid down by the CJEU in *Kadi I* requires further clarification.

¹³ Case C-438/05 *Viking* [2007] ECR I-10779.

¹⁴ For a recent analysis, see A Somek, *Engineering Equality* (Oxford, Oxford University Press, 2011).

of consistency is closely linked to *effet utile* reasoning which compromises national competence in the name of further integration. *Effet utile*, in this context, comprises ‘one big legal cluster’,¹⁵ which encompasses several judge-made legal duties and fundamental constitutional principles of EU law (eg, loyalty and primacy), as well as abstract implicit commitments (eg, uniformity and continuity).

III. CONSISTENCY AS AN INTEGRATIVE TOOL IN EU LAW

A. Consistency in the Treaty of Lisbon

The Treaty of Lisbon provides a number of provisions that refer to ‘consistency’ as a main objective or as a path to achieve legal certainty and coherence. This section will provide an overview of these provisions to understand how consistency manifests itself in the Treaty of Lisbon as a formal or black-letter notion. For reasons of economy, while this section will provide a comprehensive outline, it will not delve into a thorough examination of the implications of each and every primary or secondary law provision which refers to consistency. We will, however, locate all primary law provisions which make explicit reference to different formulations of consistency. Moreover, we will use the examples of consumer protection, data protection and EU external action, to name but a few areas, to illustrate how consistency provides justification for the adoption of EU secondary legislation. We therefore acknowledge that further research is necessary to determine how consistency is applied in every single EU policy area.

The first reference to consistency in the Treaty of Lisbon is found in Article 7 of the Treaty on the Functioning of the European Union (TFEU), which stipulates that the EU ‘shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers’. The principle of conferral inherent in Article 5(1) of the Treaty on European Union (TEU) stresses that EU acts must have a specific legal basis (*lex specialis*) in the TFEU, corresponding to the field in which the EU institutions have decided to legislate. As the EU only derives its powers and authority from powers granted in the Treaty of Lisbon, it does not possess a genuine competence to unilaterally expand its powers. This is the crucial distinction between the EU and any sovereign state. According to a commentator, ‘some application of *lex specialis* seems inevitable to produce a high degree of consistency, coherence, and

¹⁵ See, eg, E Herlin-Karnell, *The Constitutional Dimension of European Criminal Law*, (Oxford, Hart Publishing, 2012) ch 4.

predictability'.¹⁶ It follows that consistency in EU law is achieved when the EU is acting *intra vires* and the EU judiciary is rigidly applying *lex specialis* as a formal interpretation rule. Article 7 TFEU therefore aims at tackling complexity and legitimacy gaps, the permanent features of multi-level governance.

In the same vein, Article 13(1) TEU provides that the EU institutional framework 'shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions'. A glance at Articles 7 and 13 TFEU therefore suggests that not only is consistency important as a way of ensuring that the EU is acting *intra vires*, but that it also forms a significant aid in the drafting and negotiation of EU legislative proposals. An example of the use of this kind of formal consistency, or at least attempted use, is in the field of consumer protection, where Directive 2011/83 on consumer rights was proposed in order to establish a higher level of 'consistency' between existing legislation merging four directives into one set of rules.¹⁷ There is a risk, however, behind such a tidying-up exercise, because coherent EU law may result in incoherent national law. As such, the Directive has been criticised for failing to achieve its ambition in its quest for consistency.¹⁸ Consistency as a legislative aspiration is therefore in danger of becoming a buzzword, as it is not enough that a new piece of secondary law appears to have achieved a coherent legislative result. Much also depends on how secondary legislation is implemented in national law and consistency in transposition has not yet been achieved in consumer law.

On a different note, consistency is also frequently highlighted in the Stockholm Programme¹⁹ (which sets out the AFSJ agenda to be achieved during 2009–14) and the need to ensure the consistency of EU policies for the development of a successful AFSJ. In this context, consistency is linked to the orderly (EU) constitutionalisation of new areas. Moreover, the recent proposal for a directive on the processing of personal data by competent authorities for the purpose of the prevention of crime frequently stresses the

¹⁶ G Conway, 'Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ' (2010) 11(9) *German Law Journal* 966.

¹⁷ Directive 2011/83/EU of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council, and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64. For a critique, see A Arnulf, 'The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?' (2011) 36(1) *European Law Review* 51, 65.

¹⁸ See, eg, S Weatherill, 'The Consumer Rights Directive: How and Why a Quest for "Coherence" Has (Largely) Failed' (2012) 49 *Common Market Law Review* 1279.

¹⁹ The Stockholm Programme—An Open and Secure Europe Serving and Protecting the Citizen [2009] OJ C115/1.

importance of ensuring consistency for the protection of personal data.²⁰ In this sense, consistency forms a point of reference for future legislation under Title V of the TFEU. As explained above, this form of bare consistency promotes integrative and unifying legislation by the EU legislative institutions. Hence, when it comes to legal drafting, consistency can be interpreted not only as consistency of content (ie, coordination and avoidance of contradiction) but also as consistency of logic (consolidation) and goals. Consistency then seems to form part the *raison d'être* for justifying EU activity in the first place. Equally, consistency is key in the adoption of 'smart' EU regulation vis-a-vis enterprise and industry.²¹

As already stressed, apart from the importance of consistency as a value in shaping legal drafting, consistency plays theoretically an important part in judicial decision making.²² To that end, Article 256 TFEU provides that where the General Court considers that a case before it requires a decision of principle that is likely to affect the unity or consistency of EU law, it may refer the case to the CJEU for a ruling. Equally, where there is a serious threat to the unity or consistency of EU law, the General Court's preliminary rulings may exceptionally be subject to review by the CJEU. For instance, the CJEU has to ensure consistency between the rights under the EU Charter of Fundamental Rights and the European Convention on Human Rights (ECHR).²³ It needs to be stressed, however, that a review of the General Court's preliminary rulings constitutes a theoretical possibility since the CJEU is still the only EU court which hears preliminary references. On a different note, consistency may also prove important in the interaction between the CJEU and the European Court of Human Rights (ECtHR) following the forthcoming accession of the EU to the ECHR.²⁴ There, consistency may justify a purposeful interpretation of the Treaty of Lisbon in order to preserve the integrity of the EU legal system against external influences.

²⁰ See, eg, European Commission, 'Proposal for a Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purpose of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data' COM(2012) 10 final.

²¹ European Commission, 'Smart Regulation in the European Union (Communication)' COM(2010) 0543 final.

²² B Levenbook, 'The Role of Coherence in Legal Reasoning' (1984) 3 *Law and Philosophy* 355.

²³ See especially Charter of Fundamental Rights of the European Union [2000] OJ C364/01, art 52(3): 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

²⁴ On the EU's accession to the ECHR, see, eg, N O'Meara, 'A More Secure Europe of Rights?' The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR' (2011) 12 *German Law Journal* 1813; K Dzehtsiarou, T Konstadinides, T Lock and N O'Meara, *Human Rights Law in Europe: The influence, overlaps and contradictions of the EU and the ECHR* (London, Routledge, forthcoming).

With regard to the EU's external action, Article 18(4) TEU charges the newly appointed High Representative of the Union for Foreign Affairs and Security Policy with the duty to ensure the consistency of the EU's external action. Article 21(3) TEU further adds that the Council, the Commission and the High Representative are entrusted with the duty to ensure consistency in EU external action. Similarly, in the area of common foreign and security policy (CFSP), Article 26(2) TEU states that the Council and the High Representative shall ensure the unity, consistency and effectiveness of EU action. As Eeckhout explains, the fact that consistency is such a high-level concern in the context of EU external action 'is no doubt related to the [former] pillar structure itself and the tension between intergovernmentalism and supranationalism, particularly at [the] institutional level'.²⁵ While decision making within the TEU (CFSP provisions) is a matter of unanimity in the Council, external action under Part V of the TFEU provides the Commission and the Parliament with a more prominent role in the adoption of measures in the area of common commercial policy, development cooperation and humanitarian aid, to mention but a few. What is more, consistency appears in the Treaty of Lisbon as an exporting principle within the specific context of civil protection. Article 196(1)(c) TFEU provides that the EU shall 'promote consistency in international civil-protection work' for the prevention and protection against natural or man-made disasters. So the EU appears to be not only an advocate but also, and perhaps more significantly, a promoter of consistency.²⁶

Having briefly considered the legal geography and structural aspects of consistency in the Treaty of Lisbon, it can be argued that the principle of consistency constitutes a condition for the enhancement of the unity of the EU legal order at both the horizontal and vertical levels of EU governance. Apart from Article 7 TFEU, which can be seen as a programmatic principle, all of the above-mentioned provisions provide a list of legal assignments for the EU institutions within specific policy areas. In that sense, consistency within the Treaty of Lisbon is a driving incentive for EU institutions and a rationale for mainstreaming numerous policy areas. The Treaty is, however, neither explicit about the degree of cooperation demanded by Member States to achieve consistency nor transparent about the permissible degree of federal pre-emption allowed against inconsistent national rules. For instance, the search for consistency in various external affairs presents a very different problem from that which applies in separate internal EU

²⁵ P Eeckhout, *External Relations of the EU* (Oxford, Oxford University Press, 2011), 187. Eeckhout also stresses that 'the constitutional emphasis on consistency is something of a subterfuge, an attempt to cover up inter-institutional strife, to throw a constitutional blanket on the struggles between the Council and the Commission, not to mention the Parliament'.

²⁶ See, eg, Press Release, 'Cooperation in Disaster Management: The European Union and the United States Take a Major Step Forward', IP/11/1365.

policies. The CJEU has attempted to shed light on this issue through the establishment of a notion of ‘strategic’ (sometimes even teleological) consistency examined below.

B. Consistency and the Court of Justice

The above analysis shows that the Treaty of Lisbon provides that formal consistency constitutes the main method of retaining predictability in EU law. A study of consistency in EU law, however, should also include an examination of the use of the principle by CJEU judges. This is because EU law includes both treaty objectives and judicial arguments as to what these objectives should entail. It will be seen that the CJEU has developed a notion of consistency, which could be broadly characterised as political or, as the present authors would like to refer to it, ‘strategic’ consistency. This notion also features a teleological version of consistency that is prominent in the CJEU’s far-reaching jurisprudence as part of its arsenal which helps to bring about uniformity and effectiveness in the application of EU law.

‘Strategic’ consistency constitutes a judicial tool to resolve ‘hard cases’ through a balancing exercise of national and collective EU interests. So, as noted, in *Viking* and *Laval*,²⁷ for instance, the CJEU recognised for the first time that the right to take collective action, including the right to strike, forms an integral part of EU law, the observance of which the CJEU shall always ensure. The CJEU imposed limitations upon the right to strike by ensuring that it cannot be exercised in practice without the risk of legal liability. The CJEU could not alter its inclusive market mentality at the expense of national protectionism by establishing that the right to strike comprises an indispensable component of the Member States, which would take precedence over the EU fundamental freedoms. The political implications of these decisions are still topical in light of the ‘frozen’ ‘Prodi II’ Regulation, which attempted to affirm in legislative form the restrictions on the right to strike formulated judicially by the CJEU.²⁸

In addition, consistency can form a deciding motif to coordinate the uniform application of EU law in the Member States. Such a ‘teleological’ version of ‘strategic’ consistency involves numerous obligations of outcomes. It is, however, problematic because it does not necessarily entail a consistent

²⁷ *Viking* (n 13); Case C-341/05 *Laval* [2007] ECR I-11767.

²⁸ European Commission, ‘Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services’ COM (2012) 130 final. The proposal was halted by national parliaments, which utilised the so-called ‘yellow card’ procedure. Article 12 TEU and Protocol 2 of the Lisbon Treaty provide that a third of national chambers can raise such an objection on the basis of the violation of the principle of subsidiarity. Therefore, the Proposal must now be reviewed by the Commission.

strategy on the part of the EU. To achieve uniform outcomes, the CJEU has relied on classic EU constitutional principles which have over time helped to transform Europe into a political project.²⁹ Central to the Europeanisation of national law is the principle of loyalty inherent in Article 4(3) TEU. Indeed, loyalty constitutes one of the strongest and most forceful principles to be found in the Treaty of Lisbon.³⁰ According to this principle, the Member States shall facilitate the achievement of the EU's tasks and refrain from any measure which could jeopardise the attainment of its objectives. Hence, the loyalty obligation in EU law seeks to ensure consistency between national law and EU law, in that the latter takes precedence in the event of mutual conflict.³¹

Moreover, consistency is often framed as synonymous to the 'loyalty' principle (Article 4(3) TEU) and functions both as a maxim of mutual cooperation and synergy and a corrective principle operating where Member States choose to act 'disloyally'—ie, incompatibly with EU law. As such, loyalty has provided a justification for a number of expansive readings of EU law by the CJEU.³² In the absence of a clear legal basis in the Treaty pre-Lisbon, loyalty and the EU effectiveness axiom formed the rationale for the endorsement of the principle of primacy and the establishment of state liability.³³ The above developments have undeniably encouraged uniform outcomes and have strengthened EU integration. Yet, the outcomes pushed through by the CJEU tell us little about whether loyalty is reconcilable with consistency and whether the degree of integration as achieved in the CJEU's case law is compatible with the principle of subsidiarity or national identity (Articles 4(2) and 5 TEU). Hence, the notion of loyalty needs to be assessed against certain variables—namely, a balance has to be struck between consistency and subsidiarity in the broad sense.

An example serves to clarify the point: in answering the question of whether Member States can impose territorial conditions on aid for audiovisual projects, the Commission has explained to Member States that such criteria undermine the consistency of the fundamental freedoms

²⁹ See, eg, JHH Weiler, 'The Transformation of Europe' (1991) 100(8) *Yale Law Journal* 2403.

³⁰ See, eg, JT Lang, 'The Duties of Cooperation of National Authorities and Courts under Article 10 EC' (2001) 26 *European Law Review* 84.

³¹ See, eg, E Neframi, 'The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations' (2010) 47 *CML Rev* 323.

³² See, eg, JT Lang, 'The Developments of the Court of Justice on the Duties of Cooperation of National Authorities and Community Institutions under Article 10 EC' (2008) 31 *Fordham International Law Journal* 1483.

³³ See, eg, P Craig, *EU Administrative Law* (Oxford, Oxford University Press, 2012) ch 22. While most of this section is devoted to the principle of loyalty, the authors acknowledge that there are other areas of CJEU case law like national remedies, state liability or direct effect of directives that further offer a fertile ground for the exploration of the kind of teleological consistency discussed here.

underpinning the internal market.³⁴ What is more, the CJEU has stressed that any tax exemption granted to producers and workers of cooperative societies established in the Member States needs to take place in compliance with the principles of consistency and proportionality.³⁵ In other words, Member States need to apply the old discrimination test. This is easy to do and the CJEU's jurisprudence is full of tips on how to achieve the best results. There are instances, however, where it can be argued that consistency is in short supply. In the field of competition law, for example, legal uncertainty may spring out of the implementation difficulties of Article 101 TFEU. This is allegedly because of the diverse traditions of the Member States and the ambivalent decentralised enforcement regime created by Regulation 1/2003³⁶ on the implementation of the rules on competition laid down in the EU Treaty.³⁷ Inter alia, the Regulation has been criticised for being vague and for putting legal certainty in peril because it provides that the Commission shall share its enforcement powers with National Competition Authorities and national courts.³⁸ On the other hand, however, a more convincing argument can be made against the old system of Commission exclusivity over the enforcement of Article 101(3) TFEU, which was 'abnormal' considering that most of EU law is enforced by both the EU and the national bodies, 'with a corresponding risk of diversity in practice'.³⁹ As such, Regulation 1/2003 has brought competition law enforcement back to the 'communautaire mainstream' at the expense of consistency/uniformity.⁴⁰

In all cases, the CJEU has been explicit that a Member State may not rely on the provisions and practices of its domestic legal order in order to justify non-compliance with its obligations under EU law.⁴¹ This is particularly important since the removal of the Pillar structure implies that the principle of loyalty between the EU and the Member States (Article 4(3) TEU) and between the EU institutions (Article 13(2) TEU) applies to all areas of EU activity. As is well known, not only does the principle of loyalty encompass a unified *modus operandi* for mainstreaming EU policies but, most

³⁴ J Blair, 'State Aid for Films and Other Audiovisual Works' (2011) 22(8) *Entertainment Law Review* 229, 231.

³⁵ 'ECJ Advises on Whether Tax System Entails Aid' (2011) 288 *EU Focus* 24.

³⁶ Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, 1–25.

³⁷ C Townley, 'Which Goals Count in Article 101 TFEU? Public Policy and its Discontents: The OFT's Roundtable Discussion on Article 101(3) of the Treaty on the Functioning of the European Union' (2011) 32(9) *European Competition Law Review* 441, 446.

³⁸ L Sevon, 'Application of EC Competition Rules. Preliminary Observations on Council Regulation 1/2003' in DAO Edward et al (eds), *A True European: Essays for Judge David Edward* (Oxford, Hart Publishing, 2003) 146.

³⁹ S Weatherill, *Cases and Materials on EU Law* (Oxford, Oxford University Press, 2007) 565.

⁴⁰ *Ibid.*

⁴¹ See also Case C-46/08 *Carmen Media Group Ltd* [2010] ECR I-0000.

significantly, it has provided the CJEU with a constitutional blanket for the expansion of EU law. In the context of EU external relations, Member States are under an obligation to refrain from an international obligation that may potentially jeopardise the full effectiveness of EU law. Ever since the CJEU's *ERTA* dicta,⁴² the principle of loyalty has become a necessary component of the external dimension of EU law and the development of EU implied competences.⁴³ The CJEU has found in the principle of loyalty an 'obligation of providing result'. In the judgment of *Commission v Sweden*,⁴⁴ the CJEU held that where the subject matter of a convention falls partly within the competence of the EU and partly within that of the Member States, it is imperative to ensure close cooperation between the Member States and the EU institutions. Such cooperation should take place both in the process of negotiation and conclusion, and in the fulfilment of the commitments entered into.

Therefore, loyalty has a 'pre-emptive' effect upon the behaviour of Member States in that it pre-empts them from undertaking any action that could potentially undermine the objectives of the treaties. For this reason, it seems clear that the duty of loyalty can lead to a duty of abstention even if the competence at issue is neither a priori exclusive nor pre-emptive through the application of *ERTA*.⁴⁵ Such a use of a 'best endeavours obligation' or an 'obligation of result' to discard any inconsistencies in the EU's external relations approach seems to blur the procedural duties of Member States under the principle of loyalty as an obligation of conduct.⁴⁶ The *Commission v Sweden* judgment illustrates that the obligation to cooperate derives from the requirement of uniformity in the international representation of the EU. By contrast, it can be argued that *Commission v Sweden* constitutes an one-off decision—ie, although the CJEU was extremely proactive in imposing a best endeavours obligation, it made it clear that this was confined to the specific legal context set out by the exceptional treaty provisions in question. In the same vein, it can be stressed that the overview of one case is not sufficient to substantiate broader conclusions about the

⁴² Case 22/70 *Commission v Council* [1971] ECR 263.

⁴³ Lang (n 30). See also Neframi (n 31); R Schütze, *EU Constitutional Law* (Cambridge, Cambridge University Press, 2012) ch 10.

⁴⁴ Case C-246/07 *Commission v Sweden (PFOS)* [2010] OJ C161/3. The CJEU held that, by unilaterally proposing that a chemical substance (perfluorooctane sulfonate: PFOS) be listed in Annex A to the Stockholm Convention on Persistent Organic Pollutants (2001), Sweden failed to fulfil its obligations under art 4(3) TEU. See also Case C-459/03 *Commission v Ireland (Mox Plant)* [2006] ECR I-4635.

⁴⁵ G De Baere, 'O, Where is Faith? O, Where is Loyalty? Some Thoughts on the Duty of Loyal Co-operation and the Union's External Environmental Competences in the Light of the PFOS Case' (2011) 36(3) *European Law Review* 405, 417.

⁴⁶ See, eg, C Hillion, 'Tous pour un, Un pour tous! Coherence in the External Relations of the European Union' in M Cremona (ed), *Developments in EU External Relations Law* (Oxford, Oxford University Press, 2008) 10–36.

CJEU vis-a-vis the imposition of a general best endeavours obligation upon the Member States. The authors share these views, but cannot overlook the 'strategic' consistency motive behind *Commission v Sweden*, especially in view of the fact that Sweden was pre-empted from exercising a competence in compliance with EU law. In this case consistency functioned as a constraint that required Member States not to take unilateral actions.

The principle of consistency has further adverse implications for heterogeneity in EU law if contextualised alongside the principle of primacy of EU law over national constitutions and over the international legal order.⁴⁷ The argument is as follows. Since the question of consistency as uniformity mostly arises in cases where Member States pursue conflicting aims to the spirit of the treaties, the CJEU has employed certain constitutional principles that can effectively restrain national action. Loyalty, on the one hand, as a duty of abstention, has the capacity of pre-empting national competence a priori. As seen in *Commission v Sweden*, the CJEU found in loyalty a best endeavours obligation imposed upon Member States to discard any discrepancies arising from national action capable of distorting the EU's external policy philosophy. Primacy, on the other hand, as a purpose-over-text principle appears to reinstate consistency a posteriori by precluding the application of inconsistent national measures over conflicting EU legislation. For instance, the interpretation of the Treaty of Lisbon's fundamental freedoms by the CJEU provides a good example of where the CJEU has proposed that Member States shall modify their national legislation in order to ensure consistency. In this context, consistency implies the disapplication of domestic measures that pose obstacles to free movement.⁴⁸

Clearly, the CJEU has been highly successful in using teleological 'strategic' consistency as a method of achieving uniformity across the Member States. Yet, it could be argued that the CJEU's recent approach to consistency in cases such as *Commission v Sweden* is not value-driven, nor does it forge a constitutional interpretative tool in the Dworkinian sense of consistency as integrity. It is instead tilting towards a 'constitutional diktat' based on the methodical application of coercive constitutional principles to justify EU competence and ensure the maximum effectiveness of EU law.⁴⁹ Therefore, the notion of loyalty in the present context could be seen as an expression of 'teleological' consistency. It is thus argued that the CJEU's notion of consistency may sometimes rely on an abstract reasoning which itself lacks consistency of strategy. In conclusion, the CJEU's interpretation of

⁴⁷ See, eg, G de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*' (2009) 51 *Harvard Journal of International Law* 1.

⁴⁸ See, eg, G Mathisen, 'Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement' (2010) 47 *CML Rev* 1021.

⁴⁹ See JHH Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?'* (Cambridge, Cambridge University Press, 1999) 322.

consistency requires adherence to a line of judgment and a certain mode of conduct which is historically crafted by definition and which is not attached to a clear political goal. In this context, the implications of consistency may have a grave impact on the EU's widely perceived democratic deficit, as there is little space for debate and change given the overriding requirement of consistency in terms of what could loosely be referred to as 'uniformity'.

IV. CONSISTENCY AND *DIFFERENTIATED* INTEGRATION

Having discussed the formal and strategic notions of consistency in EU law as holistic approaches to uniform outcomes (furthering integration), this section of the chapter will look into consistency as a means of generating uniform outcomes within ad hoc initiatives or sub-legal systems operating at different speeds within the EU. More specifically, we will look into the concept of flexibility as a cooperation method that does not produce uniform results for all Member States. We will further explore various forms of differentiation in EU law in order to demonstrate, first, that consistency is not explicit in all variants of differentiated integration within the EU and, secondly, that even when it is expressly manifest, such as in the area of enhanced cooperation (Article 334 TFEU), ensuring consistency might prove difficult to utilise in initiatives that promote several tiers of integration. With this in mind, we will discuss whether consistency is apt as a legal principle employed by the CJEU to 'discipline' the scope and modalities of differentiated integration. In other words, we will discuss the effectiveness of consistency as both a procedural notion (ensuring the consistency of flexibility initiatives vis-a-vis other EU policies) and one of outcomes (managing the degree of integration allowed by the variety of forms of multi-speed cooperation in the Treaty of Lisbon).

Flexibility as a legal concept, albeit with political connotations, is by no means new in EU law.⁵⁰ Weatherill has defined it as 'a many headed beast' which 'loosely ... involves the development of collaborative inter-state endeavour which does not necessarily operate within the orthodox [EU] method nor does it imply the participation of all the Member States'.⁵¹ In other words, flexibility provides a platform for the EU institutions to conceive of and implement methods of differentiated integration.⁵²

⁵⁰ G Gaja, 'How Flexible is Flexibility under the Amsterdam Treaty?' (1998) *CML Rev* 1.

⁵¹ S Weatherill, 'If I'd Wanted You to Understand I Would Have Explained it Better: What is the Purpose of the Provisions on Closer Co-operation Introduced by the Treaty of Amsterdam?' in D O'Keeffe and P Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Oxford, Hart Publishing, 1999) 21–40.

⁵² See, eg, E Vos, 'Differentiation, Harmonization and Governance' in B De Witte et al (eds), *The Many Faces of Differentiation* (Antwerp, Intersentia, 2001) 145.

Whether a la carte, two-tier or multi-speed, differentiated integration finds expression in overlapping conceptual schemes.⁵³ Moreover, Van Gerven distinguishes between two main causes of differentiation: '[i] it is either the result of derogations granted to one or more Member States [eg, transitional arrangements granted to Member States to facilitate their accession to the Union], or [ii] it is the result of enhanced cooperation between two or more Member States'.⁵⁴ We may add a third category here: the differentiating effect of partial agreements which offer an alternative to an intra-EU closer cooperation framework (eg, the Schengen Convention or the possibility for structured cooperation under the Common Security and Defence Policy).⁵⁵ Flexibility in EU law is often described as a process of 'deepening and widening' the EU project, a term which, however appealing at first, is rather vague when it comes to its practical application.⁵⁶ But one has to note that flexibility is a wide-ranging objective and represents a procedural notion rather than one of outcomes.⁵⁷

The Treaty of Lisbon provides for several forms of flexibility and differentiation, including the 'emergency brake' provisions under Articles 48(2), 82(3) and 83(3), and enhanced cooperation under Article 20 TEU and Articles 326–34 TFEU.⁵⁸ These provisions aside, the history of the EU is full of examples of mini 'opt-outs' ranging from the Swedish strict approach to alcohol, or safeguarding of the snus oral tobacco, to more serious abstention of Member States from the Eurozone or the Schengen acquis.⁵⁹ One could further argue that the treaty-based exceptions to free movement on the

⁵³ See, eg, A Stubbs, 'A Categorization of Differentiated Integration' (1996) 34 *Journal of Common Market Studies* 283; D Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 *Common Market Law Review* 17; B De Witte, 'Old-Fashioned Flexibility: International Agreements between Member States of the European Union' in G de Búrca and J Scott (eds), *Constitutional Change in the EU, From Uniformity to Flexibility?* (Oxford, Hart Publishing, 2000) 31.

⁵⁴ W Van Gerven, *The European Union: A Polity of States and Peoples* (Stanford, Stanford University Press, 2005) 29.

⁵⁵ See, eg, T Dyson and T Konstadinides, *European Defence Cooperation in EU Law and International Relations Theory* (Basingstoke, Palgrave Macmillan, 2013), 70–75.

⁵⁶ A Faber, 'Theoretical Approaches to EU Deepening and Widening: A Multi-disciplinary Overview and Some Tentative (Hypo)theses' (EU-CONSENT Project Publications, 2006). Available at: www.eu-consent.net/library/brx061012/WP%20II%20III%20Paperredefiningconcepts.pdf. See also J Shaw, 'Flexibility in a Reorganized and Simplified Treaty' (2003) 40 *CML Rev* 279.

⁵⁷ J Shaw, 'Relating Constitutionalism and Flexibility in the European Union' in de Búrca and Scott (n 53) 353.

⁵⁸ Other forms of differentiated integration include the CSDP-oriented structured cooperation, found in arts 42(6) and 46 TEU (and Protocol 10), which gives the opportunity to a group of Member States entrusted under art 44 TEU to unilaterally implement the so-called Petersberg tasks concerning humanitarian and rescue assignments, peacekeeping and combat tasks in crisis management.

⁵⁹ See generally A Rosas and L Armati, *EU Constitutional Law* (Oxford, Hart Publishing, 2010) ch 7; JC Piris, *The Future of Europe, Towards a Two-Speed Europe* (Cambridge, Cambridge University Press, 2012) ch 1.

grounds of public policy, public health and public security (eg, Articles 36 and 52 TFEU) also constitute a means of differentiation. In the same manner, the CJEU-established ‘mandatory requirements’ can be further understood within the context of differentiation vis-a-vis the permissible limits of Member States’ derogations under EU law on the free movement of goods. Moreover, there are examples of differentiation in the context of different levels of harmonisation under the internal market clause of Article 114(4)–(5) TFEU. This flexibility provision provides for derogations relating to the protection of the environment and risk regulation.

With the above in mind, the notion of consistency can be utilised as a tool in managing the outcomes of differentiated integration. If consistency is perceived as a one-size-fits-all principle, then the question is whether it is weakened by the variety of forms of differentiation in which not all Member States participate. At face value, it appears impossible to reconcile consistency with differentiation because the latter appears adverse to the traditional view of consistency as symmetry of the components of a given legal system. Constitutional asymmetry, however, is a long-standing feature of European integration. It can be argued, for instance, that differentiation simply reflects a touchstone of subsidiarity—an abstention from the integrationist one-size-fits-all template provided by the Treaty of Lisbon for most situations.⁶⁰ Hence, although at first glance certain features of consistency as a legal principle may be undermined by differentiation, the principle may be capable of transfusing the classic integrative values upon which the EU is built to newly established sub-systems, such as those created under the enhanced cooperation procedure, discussed below.⁶¹ There, consistency forms a requirement inherent in the Treaty of Lisbon mandating a certain pattern of behaviour vis-a-vis the conduct of EU institutions and the consistency of their activities with the wider policies of the EU. We will hereinafter discuss how consistency manifests itself expressly and impliedly in differentiated integration.

A. Express Consistency in the Treaty of Lisbon: Enhanced Cooperation

The desire for consistency accompanies the several forms of ‘flexibility’ under the treaties as sub-legal systems designed to promote individualisation. For instance, consistency is prominent in Title III TFEU, which contains in Articles 326–34 TFEU provisions on enhanced cooperation. In particular, Article 334 TFEU provides that the Council and the Commission shall ensure the consistency of activities undertaken in the context of enhanced cooperation and the consistency of such activities with the policies of the

⁶⁰ See also Weatherill (n 51) 21–40.

⁶¹ T Konstadinides, *Division of Powers in the European Union* (The Hague, Kluwer Law International, 2009) 256–57.

EU, and shall cooperate to that end. The Treaty of Lisbon has re-organised the previous set of rules on enhanced cooperation into two groups.⁶² First, the TEU lays down the general framework for enhanced cooperation and, secondly, the TFEU sets out the relevant criteria and details. In accordance with the pre-Lisbon legal framework, the current enhanced cooperation mechanisms still represent last resort solutions.⁶³ In addition, Articles 326 and 327 TFEU stress that enhanced cooperation may not undermine the internal market or constitute a barrier to trade or distort competition. It may thus be argued that the procedural hurdles of triggering enhanced cooperation are fairly complex when one looks at the limits set out in Article 326 TFEU.⁶⁴

It is only recently that the CJEU was called to rule on the legality of secondary legislation authorising the initiation of enhanced cooperation. Most recently, Spain and Italy contested a Council Decision authorising enhanced cooperation in the area of the creation of unitary patent protection.⁶⁵ The Decision was adopted in 2011 with a view to creating a single European patent between 25 Member States out of 27, excluding Spain and Italy, which refused to take part.⁶⁶ The two non-participant Member States brought an action for annulment against the Decision on several grounds. Two pleas are of particular importance. First, Spain and Italy argued that the EU lacked the legislative competence to adopt the Decision given that the European patent touched upon the establishment of competition rules for the functioning of the internal market under Article 3(1)(b)—an exclusive EU competence. The nature of the competence exercised by the Council was important because Article 20(1) TEU is explicit that enhanced cooperation can only be utilised in areas of non-exclusive EU competences. The CJEU disagreed and dismissed the actions brought by Spain and Italy against the Council's Decision. It held that the competence exercised in this case was relevant to the functioning of the internal market which, according to Article 4 TFEU, comprises a shared competence between the EU and the Member States. As such, the Council was competent to authorise enhanced cooperation vis-a-vis the EU patent system. Secondly, Spain and Italy argued, rather unsuccessfully, that in adopting the contested Decision, the Council did not pay lip service to Article 20(2) TEU, which provides that any exercise of enhanced cooperation must constitute a last resort and not a shortcut for speedy cooperation. There is a clear link between such a last-resort requirement when it comes to flexibility expressed in enhanced

⁶² JC Piris, *The Lisbon Treaty* (Cambridge, Cambridge University Press, 2010).

⁶³ In all areas except criminal law, which is discussed below.

⁶⁴ Rosas and Armati (n 59) 108–10.

⁶⁵ Joined Cases C-274/11 and C-295/11 *Spain and Italy v Council* (ECJ, 16 April 2013).

⁶⁶ Council Decision 2011/167/EU authorising enhanced cooperation in the area of the creation of unitary patent protection [2011] OJ L76/53.

cooperation and the way in which the subsidiarity principle generally operates in EU law. A common feature shared between flexibility and subsidiarity is that they both require other solutions to be tried out first before resorting to them.⁶⁷ As such, not only are they lightly applied in the course of EU law but they also share a light judicial review by the CJEU due to their political sensitivity.

In light of the above, we need to ask where the notion of consistency fits into the equation. Article 118 TFEU provides that a uniform European system of intellectual property rights shall be established. We have already discussed that one of the prominent manifestations of consistency is the uniformity of outcomes. In the same vein, the CJEU stressed in its judgment in *Spain and Italy v Council*:

It is apparent from the first paragraph of Article 326 TFEU that the exercise, within the ambit of enhanced cooperation, of any competence conferred on the Union must comply with, among other provisions of the Treaties, that which confers that competence. The enhanced cooperation to which these actions relate must, therefore, be consistent with Article 118 TFEU.⁶⁸

In the view of the CJEU, the correct interpretation of Article 118 TFEU does not, therefore, imply a uniform interpretation throughout the whole EU, but one that follows on from Article 20(4) TEU, which states that: ‘Acts adopted in the framework of enhanced cooperation shall bind only participating Member States.’ Contrary to another plea raised by Spain and Italy, the CJEU made it plain that by creating a unitary patent applicable in the participating Member States only (while being open to all Member States) and not in the EU, the contested Decision did not damage the internal market or the economic, social and territorial cohesion of the EU contrary to Articles 118 and 326 TFEU and Article 20(1) TEU. From a consistency perspective, this is a very interesting approach when compared to the context of Article 114 TFEU case law, where the CJEU has been explicit that disparities between Member States form the main reason for the adoption of new harmonisation legislation.⁶⁹

Moving on to the limitations of the enhanced cooperation procedure, it should be recalled that the pre-Lisbon unanimity requirement in the Council for authorisation to proceed with enhanced cooperation severely limited its actual implementation. As such, enhanced cooperation remained

⁶⁷ Enhanced cooperation is traditionally considered to lie in the same pathway as EU subsidiarity as it accepts that there is room for action outside the EU model. See also Weatherill (n 51) 21.

⁶⁸ *Spain and Italy v Council* (n 65) [66].

⁶⁹ See, eg, Case C-210/03 *Swedish Match* [2004] ECR I-11893. The CJEU stressed that while mere disparities between national rules cannot justify recourse to art 114 TFEU, it is sufficient where there are differences between the laws, regulations or administrative provisions of the Member States which could obstruct fundamental freedoms and thus have a direct effect on the functioning and establishment of the internal market.

idle until recently.⁷⁰ By contrast, the post-Lisbon use of qualified majority in the Council to activate enhanced cooperation has encouraged its use.⁷¹ For instance, the first ever approval of resort to enhanced cooperation since 1997 took place in July 2010 with reference to the law applicable to divorce and legal separation supported by 10 Member States.⁷² Shortly after this initiative, the enhanced cooperation procedure was used in the area of unitary patent protection.⁷³ Overall, enhanced cooperation is an effective method in allowing certain Member States to move forward by using the ‘Community method’ without being held back by their less integrationist counterparts. At the same time, it is inclusive to non-participant Member States who may wish to take part in an initiative at a later date. Yet, despite treaty adjustments, as already pointed out in the context of recent CJEU jurisprudence, enhanced cooperation remains a last-resort mechanism and subordinate to the functioning of the internal market. This policy hierarchy is shaken when it comes to the use of enhanced cooperation in criminal law matters. In this area, enhanced cooperation is granted without a prerequisite of compliance with the principle of consistency or indeed the limitations set out by Article 20(1) TEU (ie, that Member States wishing to establish enhanced cooperation within the framework of the EU’s non-exclusive competences may apply the relevant provisions of the treaties, subject to the limits and in accordance with the detailed arrangements laid down in this provision and in Articles 326–34 TFEU).

⁷⁰ Press Release ‘A First in EU History: Enhanced Cooperation to Help International Couples is in Force’, IP/10/1035. Available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1035>. See also Council Decision of 2010/405/EU of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L189/12.

⁷¹ Member States who wish to establish enhanced cooperation between themselves in one of the areas covered by the treaties, but for fields of EU exclusive competence and the CFSP shall address a request to the Commission, specifying the scope and objectives of the enhanced cooperation in question. Authorisation to proceed with such enhanced cooperation shall be granted by the Council (acting by qualified majority), on a proposal from the Commission and after obtaining the consent of the European Parliament.

⁷² Council Decision (n 70). See also S Peers, ‘Divorce, European Style: The First Authorisation of Enhanced Cooperation’ (2010) 6(3) *European Constitutional Law Review* 339. It should perhaps be mentioned that a second authorisation of enhanced cooperation was adopted in March 2011 ([2011] OJ L76/53) and concerns a non-Justice and Home Affairs area (Unitary Patent Protection). On this, see S Peers, ‘Mission Accomplished? EU Justice and Home Affairs Law After the Treaty of Lisbon’ (2011) 48(3) *CML Rev* 661.

⁷³ Council Decision 2011/167/EU of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection [2011] OJ L76/53. There is currently a case pending for the annulment of this decision: Case C-295/11 *Italian Republic v Council of the European Union* [2011] OJ C232/21. Italy argues, inter alia, that the enhanced cooperation procedure was authorised by the Council outside the limits provided for in the first subparagraph of art 20(1) TEU, according to which such a procedure is to be allowed only within the framework of the EU’s non-exclusive competences. Italy argues that the EU has an exclusive competence to create ‘European rules’ which have art 118 TFEU as their legal basis.

Furthermore, the Treaty of Lisbon is silent about the place of consistency with regard to Title IV TEU, which envisages a form of enhanced cooperation with reference to both the CFSP and the common security and defence policy (CSDP). Nevertheless, it can be deduced that Article 20(1) TEU transmits consistency to enhanced cooperation taking place both under the TFEU and the TEU. Yet, the accepted exclusion of supra-national action in the field of European defence cooperation may be problematic for the advancement of enhanced cooperation in the area of the CSDP. Indeed, a European defence policy led by a pioneer group establishing enhanced cooperation would affect the consistency of the CSDP. Acts adopted under this provision would in time have to be acknowledged by those Member States which intend to participate in a given policy area. In that sense, consistency as the inner logic of a policy advanced by enhanced cooperation may be jeopardised rather than facilitated. In the grand scheme of things, it may be argued that differentiation is detrimental to consistency in a holistic sense, ie, as a meta-principle underpinning the EU legal system. The political dimension of external affairs intervenes in practice whenever Member States see their self-interests as being worthy of protection regardless of the EU position.

It should perhaps be recalled that prior to the entry into force of the Treaty of Lisbon, the provisions for enhanced cooperation and strict legal criteria employed governing these provisions meant that no enhanced cooperation was ever adopted (set out in former Article 11 EC and Articles 40 and 43 TEU). As such, the exact boundaries of the *acquis communautaire* remained unclear, but its clarification was important for ensuring that Member States would not establish enhanced cooperation in a way that would compromise the Community's interests.⁷⁴ In any case, these strict legal criteria meant that enhanced cooperation was never utilised prior to the entry into force of the Treaty of Lisbon. The fear of legal fragmentation in this area, however, did not prejudice the rise of the phenomenon of a 'two-speed' Europe manifested in the Treaty of Prüm⁷⁵ and the Schengen *acquis*.⁷⁶ These examples are indicative of the Member States' wish to move further than their less integrationist counterparts in establishing the highest possible standard of cooperation. Such cooperation has taken place, for instance, by means of regular exchanges of information between Member States in order to counter terrorism, cross-border crime and illegal migration.⁷⁷

⁷⁴ Weatherill (n 51).

⁷⁵ Convention between Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria, signed in Prüm, Germany on 27 May 2005.

⁷⁶ The Schengen Agreement of 1985. See generally S Peers, *EU Justice and Home Affairs* (Oxford, Oxford University Press, 2006) ch 1.

⁷⁷ See generally European Union Committee, *Prüm: An Effective Weapon Against Terrorism and Crime?* (HL 2006-07, 90-I). Available at: www.statewatch.org/news/2007/may/eu-hol-prum-report.pdf.

We will now look briefly into the application of the principle of consistency in two policy areas in which the Member States are likely to resort to enhanced cooperation, namely the CFSP and the AFSJ. Starting with the CFSP, we need to stress that the principle of loyalty set out in Article 4(3) TEU also applies in the field of EU external relations. Nonetheless, although such an all-encompassing obligation safeguards consistency, the CJEU is excluded from monitoring the CFSP (Article 275 TFEU). Instead, the monitoring of consistency compliance in EU external policy forms one of the tasks of the High Representative (Article 18 TEU), assisted by the European External Action Service (Article 27(3) TEU). Yet there is a double burden of consistency within the CFSP field, which calls for clarification. Apart from the High Representative, who is under an obligation to make sure that EU law pertaining external relations is consistent, the Council and the Commission shall ensure consistency in the context of enhanced cooperation as set out in Article 334 TFEU. More specifically, Article 20 TEU borrows from Article 329(2) TFEU, which provides that the launching and authorisation of enhanced cooperation in the fields of the CFSP and the CSDP requires an institutional interplay between the Council, the High Representative and the Commission, as well as unanimity in the Council. The High Representative is then asked to give an opinion on whether the enhanced cooperation initiative is consistent with the EU's foreign and security policy, while the Commission shall give its opinion on whether the proposal is consistent with other EU policies.

In the context of the AFSJ, the move to qualified majority voting is likely to affect the volume of legislation agreed under Articles 82 and 83 TFEU in judicial cooperation in criminal matters. As such, the so-called 'emergency brake' offers a degree of flexibility and appears to have been crucial in convincing Member States to surrender aspects of their national sovereignty in criminal matters over to the EU.⁷⁸ More specifically, Articles 82(2)–(3) and 83(1)–(3) TFEU, which govern procedural and substantive criminal law, provide Member States with the possibility of freezing a proposal if they consider that an initiative is capable of affecting fundamental aspects of their criminal justice system. The matter is then referred to the European Council and the ordinary legislative procedure is suspended. Despite the significance of the emergency brake as a mechanism that compensates for the inherent risks of the removal of the national veto in EU criminal justice, one cannot overlook the potential fragmentation that its abuse may generate. Against the paralysis that may result from an unprecedented use of the emergency brake, the Treaty of Lisbon provides, under Article 83(3)(ii) TFEU, that if nine Member States wish to proceed with a far-reaching proposal, they may resort to enhanced cooperation. Still, however, the

⁷⁸ See, eg, Peers (n 76) ch 9.

enhanced cooperation procedure has not yet been utilised in criminal law matters. Perhaps Member States find it challenging to balance a set of conflicting interests, such as the imperative of moving forward with respect towards the sensitive nature of criminal law.⁷⁹ This is perhaps why criminal justice is the only area where the Treaty of Lisbon provides for automatic enhanced cooperation. Such practice, however, does not chime with the recurrent requirement of ensuring consistency across EU policies as stipulated in Article 13 TEU. Making enhanced cooperation automatic in the area of criminal law puts into sharp relief the value of the emergency brake as a safeguard to national sovereignty.

B. Implied Consistency: Opt-Outs and the Court of Justice's approach

The promotion of consistency is not express in the Treaty of Lisbon's opt-out clauses. These clauses have traditionally been used as means of repatriating domestic powers from the EU by abstaining from joining the majority of Member States in a particular policy area. Member State-specific opt-outs proliferated with the Treaty of Lisbon, and together with them, a transitional regime that undermines the consistency of EU law came into existence. For instance, one of the most striking features of differentiation characterising the AFSJ is that the former EU Third Pillar is still in force.⁸⁰ After all, Protocol 36 on Transitional Provisions provides for a five-year transition period (which ends in November 2014) before the (former) Third Pillar instruments become 'Communitarised' or, if we may, 'Lisbon-ised' and thus fall under the full jurisdiction of the CJEU. Therefore, despite the entry into force of the Treaty of Lisbon and, thereby, the merging of the former Pillars, there is still a strong presence of the old Third Pillar in terms of the transitional protocol and the five-year transition period that it stipulates. The result is that, during the transitional period, the Commission will not have the power to bring infringement procedures before the CJEU against Member States for breaches of existing AFSJ measures. Despite the absence of an express treaty commitment to consistency in this area of EU law, the legal uncertainty caused by the AFSJ transitional period necessitates an implied use of consistency while respecting the wishes of the Member States to delay the activation of the full panoply of criminal measures.

⁷⁹ See, eg, E Herlin-Karnell, 'Enhanced Cooperation and Conflicting Values: Are New Forms of Governance the Same as Good Governance?' in M Trybus and L Rubini (eds), *After Lisbon: The Impact of the New Treaty on European Union* (Cheltenham, Edward Elgar, 2012) ch 8.

⁸⁰ Title V TFEU. See especially Arts 82–86 TFEU.

Such a use of consistency will balance, for instance, the approach of the UK and Ireland with reference to their reception of the AFSJ legal framework. Their approach represents one of the most drastic examples of what has been characterised as a ‘Europe of bits and pieces’.⁸¹ While the opt-out has historically provided that the UK and Ireland are not bound by any AFSJ measures unless they choose to participate (opt-in),⁸² Lisbon’s Protocol 21 has extended such an opt-out to all areas including AFSJ measures in criminal law which previously fell outside the opt-out/opt-in scheme. The opt-out now applies to measures to which these Member States had previously opted-in. Protocol 21 also states that the UK and Ireland are not bound by the general right to data protection as provided by Article 16 TFEU. In addition to Protocol 21, the so-called ‘Schengen opt-out’ in Protocol 19 confirms the British and Irish abstention from the Schengen acquis.

Also, Protocol 19 and 22 (and Article 3 of Protocol 19) provides Denmark with a similar opt-out, although it is not as extensively ‘flexible’ as the British and Irish one.⁸³ Denmark has opted for a static approach and expressed its unwillingness to take part in the AFSJ without the direct possibility to opt back in like the UK and Ireland. Indeed, Protocol 22, attached to the Treaty of Lisbon, grants Denmark a special position vis-a-vis the right to remain outside the AFSJ. Notwithstanding its abstention from the AFSJ, Denmark will still participate in Schengen-related measures and pre-Lisbon (former) Third Pillar instruments on the basis of international law which, as ever, continues to be binding and applicable to Denmark. Denmark may, however, notify the other Member States that it wishes to join the EU criminal law venture.⁸⁴ Arguably, the Danish approach of saying no to the whole AFSJ project threatens the consistency of the practicability of the AFSJ project, as the judicial system is largely based on mutual recognition in this area. Nevertheless, others have argued that the approach adopted by Denmark strengthens sovereignty without undermining uniformity in the AFSJ. More specifically, Adler-Nissen argues that differentiated integration is not a threat to the notion of ‘an ever closer Union’ but—as a matter of practice—an innovation quite consistent with the doxa of integration.⁸⁵ Indeed, it could be argued that this is a confirmation of the

⁸¹ Curtin (n 52).

⁸² See A Hinarejos, J Spencer and S Peers, ‘Opting Out of Criminal Law What is Actually Involved?’ (2012) Centre for European Law Cambridge Working Paper 1/2012. Available at: www.cels.law.cam.ac.uk/Media/working_papers/Optout%20text%20final.pdf.

⁸³ See generally P Craig, *The Lisbon Treaty* (Oxford, Oxford University Press, 2010); Peers (n 76).

⁸⁴ See E Herlin-Karnell, ‘Denmark and the European Area of Freedom, Security and Justice: A Scandinavian Arrangement’ (2011) 5(1) *Amsterdam Law Forum* 95. Available at: <http://ssrn.com/abstract=2246709>.

⁸⁵ R Adler-Nissen, ‘Opting Out of an Ever Closer Union: The Integration Doxa and the Management of Sovereignty’ (2011) 34(5) *West European Politics* 1092.

CJEU's approach, as demonstrated in *Spain and Italy v Council*,⁸⁶ which is discussed above. But there is one important difference. Exporting the 'bits-and-pieces' approach to the AFSJ also runs the risk of undermining fundamental rights protection and thereby lowering the standard in human rights protection in the EU where it is most needed.

In any case, and to continue the story of differentiation, Article 10(4) of Transitional Protocol 36 allows the UK to notify the Council that it does not accept the 'Lisbon-isation' of pre-existing criminal measures. Although the British government is planning to opt-out of 130 policing and criminal justice measures, it seems unlikely that it would choose to opt-out of former Third Pillar measures already in force—such as the Framework Decision on the European Arrest Warrant (EAW)⁸⁷—unless they are amended.⁸⁸ Especially with regard to the EAW, it has been stressed that if the British government decides to opt-out of the AFSJ, it should opt back into the EAW at once in order to escape the possibility of any gap arising in its application.⁸⁹ Some uniformity will therefore be preserved due to the UK's role as an eager proponent of EU anti-terrorism, data surveillance⁹⁰ and anti-money laundering legislation.⁹¹ These are key measures for public safety. Consistency in this context is therefore less of a central principle and more of a mask for pragmatic decision making.

Although the Treaty of Lisbon has amplified the potential for differentiation, it should be emphasised that the CJEU has been reactive towards unilateral initiatives by Member States to stretch the opt-out cherry-picking approach. For instance, the CJEU has been adverse towards Member States which, once they had secured an opt-out from a certain policy area, later demanded to be included in the adoption of legislation relevant to this area. For instance, under the Schengen rules, the UK may make a request to the Council for authorisation to participate in part or all of the Schengen provisions and, in addition, to contribute to the adoption of measures based on the Schengen *acquis* (Articles 4 and 5 of the Schengen Protocol). The

⁸⁶ *Spain and Italy v Council* (n 65).

⁸⁷ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1.

⁸⁸ Ibid. For a detailed account of the transitional rules, see Peers (n 76) 82–83.

⁸⁹ A Travis, 'EU Policing and Justice Opt-Out Would Endanger Internal Security, Lords Warn' *The Guardian* (London, 23 April 2013).

⁹⁰ See Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54. See also T Konstadinides, 'Destroying Democracy on the Ground of Defending it? The Data Retention Directive, the Surveillance State and Our Constitutional Ecosystem' (2011) 36(5) *European Law Review* 722–36.

⁹¹ Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (Third Money Laundering Directive) [2005] OJ L309/15.

Council will have to decide on such a request by unanimity unless the legislative proposal in question is built on the pre-existing Schengen acquis, to which the UK has secured an opt-out. Such was the case in *UK v Council*,⁹² where the UK sought the annulment of Regulation 2007/2004 adopted in 2004 with a view to establishing an external border control agency.⁹³ The UK was not included in the adoption of the challenged Regulation that was building on the provisions of the pre-existing Schengen acquis. In yet another case, the UK sought, again, the annulment of a regulation on the standards for security features and biometrics in passports and travel documents issued by Member States. As in the previous case, the UK was excluded from participating in the regulation's adoption.⁹⁴ In both cases, the CJEU upheld the Council's discretion to refuse to allow the UK to take part in the adoption of these regulations.⁹⁵ These judgments can be characterised as consistency-driven. The implied use of consistency by the CJEU served to compensate for the lack of textual reference to consistency in the Treaty of Lisbon vis-a-vis the execution of opt-outs. The Schengen example demonstrates that the CJEU can effectively police the Member States' level of participation in a given policy area by 'gate-keeping' their preferences which amount to non-unitary integration.⁹⁶ Such a 'strategic' consistency approach by the CJEU in the opt-out 'hard cases' is a welcome development.

V. CONCLUSION

This chapter has sought to provide an account of the rise of and many expressions of the principle of consistency in EU law and thereby to shed some light upon its legal, strategic and theoretical implications. In doing so, we discussed consistency as being of fundamental importance both within the treaty structure as a mechanism for ensuring institutional balance and in the CJEU's reasoning. This is important with regard to the EU's internal

⁹² Case C-77/05 *UK v Council* ECR I-11459; Case C-137/05 *UK v Council* [2007] ECR I-11593.

⁹³ Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L349/1. See also E Fahey, 'Jagged-Edged Jigsaw: The Limits of Multi-speed Integration and Policy Choices of Ireland and the UK' in Trybus and Rubini (n 79).

⁹⁴ Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States [2004] OJ L385/1.

⁹⁵ Above n 92.

⁹⁶ See also M O'Neil, 'EU Cross-border Policing Provisions, the View from One of the Schengen Opt Out States' (2009) *European Journal of Crime, Criminal Law and Criminal Justice*. Available at: http://uaces.org/documents/papers/0901/o_neill.pdf.

and external policies,⁹⁷ as well as horizontally between EU institutions and, vertically between the EU and the Member States. With regard to the vertical relationship between the EU and the Member States, we looked at the Treaty of Lisbon's thin formal consistency and the CJEU's notions of 'strategic' consistency. We examined how the core principle of loyalty that governs the relationship between the EU and the Member States has been stretched by the CJEU to ensure consistency in the application of EU law.

Whilst the CJEU's notion of 'strategic' consistency seems welcome in 'hard cases', there are cases where it appears that there is little consistent strategy behind the CJEU's teleology. For instance, it is unclear whether the CJEU's notion of consistency as an 'best endeavours obligation' has been built gradually on a case-by-case basis or whether instead it constitutes part of a more concrete strategy to build a coercive constitutional dictum which binds Member States in all cases. As such, it can be argued that within the classic model of uniform integration, consistency's flimsy textual meaning and its interpretation by the CJEU have destabilised it as a principle. It is therefore suggested that the political institutions of the EU provide some guidelines regarding the meaning of the principle and its implications for the division of powers in EU law.

As to the question of whether consistency has a role to play in differentiated integration, we discussed the extent to which certain schemes of differentiated integration are characterised by an overlying consistent approach. Our response stresses that consistency is indeed crucial in this area in whichever form it manifests itself—expressly or implicitly. Yet, consistency is hard to apply and measure within differentiated integration. The Treaty of Lisbon provides for several forms of flexibility and differentiation. We looked into the added value of consistency within variables of differentiation in which consistency is either highlighted by the Treaty of Lisbon or remains neglected. The discussion of asymmetric constitutional arrangements, such as the enhanced cooperation procedure and the AFSJ opt-outs, illustrates that consistency is not only relevant where it enjoys an express or textual reference in the Treaty, but it may also comprise an implied concern in all EU policy areas because it may help EU institutions (the CJEU in particular) countering fragmentation. Yet, on the downside, the concept of flexibility can be too political for the CJEU to conceptualise—thus, there is a potential problem of justiciability.⁹⁸ It is therefore imperative that the CJEU handles sensitive cases with care, since the very notions of flexibility and

⁹⁷ R Wessel, 'The Inside Looking Out: Consistency and Delimitation in EU External Relations' (2000) 37 *CML Rev* 1135; P Van Elsuwege, 'EU External Action After the Collapse of the Pillar Structure: In Search of a New Balance Between Delimitation and Consistency' (2010) 47 *CML Rev* 987.

⁹⁸ F Amtenbrink and D Kochenov, 'Towards a More Flexible Approach to Enhanced Cooperation' in A Ott and E Vos (eds), *50 Years of European Integration: Foundations and Perspectives* (The Hague, TMC Asser Press, 2009).

consistency are too slippery as legal concepts and easily transgress competence borders.

As discussed in this chapter, consistency has provided the CJEU with justification for a number of incremental judgments based on the rationale that the consistent application of codified and non-codified legal duties and principles not only guarantees the integrity of the EU legal system but also boosts its uniformity and effectiveness. Yet, as explained above, due to the post-Lisbon transitional measures, the CJEU stands at an awkward juncture by not being able to adjudicate upon a host of areas previously tucked away to the former intergovernmental Pillars. For instance, the manifold opt-outs and opt-ins negotiated with reference to the AFSJ will affect the ability of the CJEU to achieve a workable dynamic. Nevertheless, the CJEU seems at times to have entertained the possibility of a multi-speed Europe.⁹⁹ To use an example, it recently held that for the sake of the future development of the Schengen acquis, Member States are not obliged, when they develop closer cooperation between themselves, to provide for special adaptation measures for other Member States which have not yet taken part in the adoption of measures relating to earlier stages of the evolution of the acquis.

In the absence of a single agreed-upon definition, consistency still remains as much an aspiration principle—a truism that different statements of law need to be in tune—as a pointer to a number of EU legal obligations. It could also be added that, however significant in preserving good governance, the idea of consistency within EU law constitutes a symbolic concept—a quality closely connected to the wider integrationist task of making the EU more relevant and comprehensive to its citizens.¹⁰⁰ However, even if we accept consistency's symbolic character, it appears that the citizen plays no particular role in the search for consistency. As such, the consistency question turns on the more complex questions of institutional balance and competence delimitation between the EU and the Member States that the CJEU has often resolved in favour of the former. But the quest is not yet complete. Article 7 TFEU presents us with the destination (ie, that the EU 'shall ensure consistency between its policies and activities'), but provides no particular instructions as to how to reach it.

Whilst hardly anyone would disagree that the EU should be a consistent project, reconciling the principle of consistency with the principle of conferral of powers remains difficult. In this contribution, we have tried to capture the essence of consistency and have argued that consistency should be perceived as a benchmark which seeks to strike the right balance of EU

⁹⁹ Case C-482/08 *UK and Ireland v Council* (ECJ, 26 October 2010). See also Faber (n 56); J Shaw, 'Flexibility in a "Reorganised" and Simplified Treaty' (2003) 40(2) *CML Rev* 279.

¹⁰⁰ See also C Harlow, 'A Common European Law of Remedies?' in C Kilpatrick et al (eds), *The Future of Remedies in Europe* (Oxford, Hart Publishing, 2000) 69.

action. It operates as a balancing mechanism. This begs the following question: should consistency always be taken to mean more EU law involvement merely because the very concept of uniformity is an inherent characteristic of the process of integration? Such a view would seem to suggest that consistency forms part of the more general ambition of ensuring the *effet utile* of EU law. If that is the case, then why do we need the separate notion of consistency written all across the Treaty of Lisbon? While a value-based ‘strategic’ consistency approach by the CJEU is desirable to resolve ‘hard cases’, the over-application of or preference for teleological ‘strategic’ consistency would ultimately distort the division of powers in EU law and would threaten harmony—generating a crack in the boundary line that divides the two main plates of the EU’s crust.

